IN THE MATTER OF An Adjudication under Division XIV – Part III of the *Canada Labour Code* – Complaint of Alleged Unjust Dismissal – YM2707-11620

BETWEEN:

LEAHA G. TACAN,

Complainant,

- and -

SIOUX VALLEY DAKOTA NATION,

Employer.

Adjudicator

Jeffrey J. Palamar

Appearances

For Leaha G. Tacan:
Ruth Pryzner - representative
Leaha G. Tacan - on her own behalf

For Sioux Valley Dakota Nation:
Kris M. Saxberg - legal counsel
Robyn Fraser – legal counsel
Katherine Olson – legal counsel

REASONS FOR INTERIM AWARD ON STATUS OF REPRESENTATIVE

1. Mrs. Tacan was an employee of Sioux Valley Dakota Nation, employed from February 27, 2016 to November 7, 2018.

2. She filed an unjust dismissal complaint under the Canada Labour Code (the "Code") on December 4, 2018 alleging she was unjustly dismissed.

3. I was appointed adjudicator on May 9, 2019.

4. The Employer objected to my jurisdiction on 2 grounds;

- it was a self-governing First Nation subject to its own jurisdiction, and not covered by the Code; and

- Mrs. Tacan's employment was subject to provincial and not federal jurisdiction.

5. The parties agreed to deal with these two jurisdictional issues on a preliminary basis and this proceeded to hearing in Brandon, Manitoba on August 20, 2019. If I found there was jurisdiction we would proceed to a subsequent hearing on the merits. If I found there was no jurisdiction, then we would not.

6. I issued a decision on September 19, 2019 dismissing the objection asserting I had no jurisdiction because the Employer was a self-governing First Nation subject to its own jurisdiction, and not covered by the Code.

7. On the second jurisdictional objection (that I had no jurisdiction as Mrs. Tacan's employment was subject to provincial and not federal jurisdiction) I reviewed the evidence and arguments advanced by the parties, but did not then issue a decision.

8. This was primarily because after our hearing I became aware of other case law which I felt might be relevant and was not prepared to render an award without allowing the parties input. Instead, I shared that case law with the parties and specifically retained jurisdiction to revisit the issue based on further evidence and/or case law and argument being provided by either party.

9. We then reconvened in Brandon, Manitoba, on December 17, 2019 where further documents were entered by agreement into evidence and the parties provided further arguments. It was agreed that if I found there was jurisdiction we would proceed to a subsequent hearing on the merits, but if I found there was no jurisdiction, then we would not.

10. On February 7, 2020 I issued a decision dismissing the objection to my jurisdiction on the basis that Mrs. Tacan's employment was subject to provincial and not federal jurisdiction.

11. We then planned a call for February 25, 2020 to schedule the hearing on the merits.

12. On the morning of February 25, 2020 and just a few hours before our planned call, legal counsel for the Employer advised me by email the Employer would be filing an application with the Federal Court seeking judicial review of the jurisdictional decisions.

13. In our planned call of February 25, 2020 legal counsel for the Employer confirmed it would be filing the application for judicial review and also seeking a stay of proceedings pending that review. Despite that, at the request of Mrs. Tacan we set hearing dates for this matter to proceed on the merits on May 7 and 8, 2020. I also directed the parties to keep me apprised as matters proceeded in Federal Court, and particularly on what the Federal Court decided in terms of the request for a stay of proceedings.

14. On March 5, 2020 the Employer filed its materials with the Federal Court seeking judicial review and a stay of proceedings.

15. On March 17, 2020 in the context of the pandemic and Court closures, legal counsel for the Employer wrote to advise of the unlikelihood of being able to have the stay of proceedings application heard in Court prior to the scheduled dates of the hearing on the merits of May 7 and 8, 2020, and requested an adjournment.

16. On March 17, 2020 and after hearing from the parties I ordered that in the remarkably unique circumstances arising since our conference call, it was only fair the hearing dates of May 7 and 8, 2020 for the hearing on the merits be abandoned. I ordered the Employer to proceed with its applications to Court (for judicial review, and on the stay of proceedings) forthwith and as soon as reasonably possible in the circumstances, and to keep all informed promptly as matters moved forward. I ordered that what the Federal Court decided respecting the stay of proceedings would determine how we moved forward on setting new hearing dates on the merits, and specifically retained jurisdiction to re-address matters as need be.

17. On September 1, 2020 legal counsel for the Employer advised me the Federal Court had dismissed the application for a stay of proceedings.

18. We then had a call on September 8, 2020 to schedule the hearing on the merits, and determine various pre-hearing production requirements. We scheduled the hearing on the merits for November 23, 24 and 25, 2020 in Brandon Manitoba. The venue was to be determined but based on the parties' needs had to be able to accommodate a minimum of eight people at any given time safely, taking into account whatever requirements would be in place in the context of the pandemic.

19. As the dates for the hearing on the merits approached and due to the ongoing pandemic and restrictions on in-person meetings, it became apparent that an in-person hearing was impossible on the dates scheduled. As a result, a call was scheduled for November 12, 2020 in order to discuss all options, including holding a virtual hearing.

20. On November 11, 2020 legal counsel for the Employer sent an email raising concerns regarding the role Ms. Pryzner had played in these matters. Essentially, the Employer took the position she had been acting as a lawyer, that was inappropriate and ought not to be allowed to continue. Counsel acknowledged this was the first time the issue had been raised before me.

21. On November 12, 2020 our call took place. I advised the parties that due to the ongoing issues related to the pandemic an in-person hearing on the merits was not going to occur as scheduled, and if we were to proceed on those dates it would have to be in a virtual hearing. That was not an option acceptable to all concerned, and so the hearing on the merits scheduled for November 23, 24 and 25, 2020 was adjourned.

22. This still left to be addressed the role of Ms. Pryzner. She and Mrs. Tacan asserted the role she had played and wanted to continue to play was appropriate. The Employer disagreed. The parties and I considered options including the possibility of Ms. Pryzner continuing in the process but assuming a different role, where she would not ask questions and not make submissions. This would have been acceptable to the Employer, which expressly confirmed that if she did assume this role it would not later challenge that as inappropriate.

23. We adjourned briefly so Mrs. Tacan and Ms. Pryzner could consider matters further. When we reconvened they advised they were not prepared to agree to the Employer's proposal. As a result, we scheduled a motion to deal with the question of the proper role for Ms. Pryzner, to be heard on January 4, 2021.

24. In the interim I contacted the Law Society of Manitoba to advise it of these matters.

25. As it turned out the pandemic again interfered and due to ongoing restrictions on in-person meetings, at the request of Ms. Pryzner and Mrs. Tacan we rescheduled from January 4, 2021 to January 14, 2021.

26. On January 14, 2021 the Employer and Mrs. Tacan (with the assistance of Ms. Pryzner) provided their submissions on this issue. The Law Society of Manitoba did not participate despite having notice of the proceeding.

27. These then are my reasons for the Employer's objection to the role to be played by Ms. Pryzner, asserting she had been acting as a lawyer, that was inappropriate and ought not to be allowed to continue.

28. I have summarized the most relevant arguments below. While I do not refer specifically to everything presented by the parties, in making my decision I have in fact considered carefully everything presented.

29. I have set out in considerable detail here the events that took place from the filing of the complaint throughout this process to this particular objection on Ms. Pryzner's role. I have done so because it is potentially relevant to the argument this objection was untimely, but also so as to provide some explanation for why what is supposed to be a fairly expedited process has taken as long as it has.

Argument of the Employer

30. The unauthorized practice of law is prohibited by The Legal Profession Act of Manitoba;

> 20(2) Except as permitted by or under this Act or another Act, no person shall:
> (a) carry on the practice of law;
> (b) appear as a lawyer before any court or before a justice of the peace;
> (c) sue out any writ or process or solicit, commence, carry on or defend any action or proceeding before a court; or
> (d) attempt to do any of the things mentioned in clauses (a) to (c).

31. The only exceptions to the unauthorized practice of law are in section 20(4) of The Legal Profession Act, none of which apply here;

> 20(4) Subsection (2) does not apply to the following:
> (a) a public officer acting within the scope of his or her authority as a public officer;
> (b) a notary public exercising his or her powers as a notary public;
> (b.1) a district registrar or deputy district registrar under The Real Property Act acting within the scope of the duties of a district registrar;
> (c) a person preparing a document for his or her own use or to which he or she is a party;
> (d) a person acting on his or her own behalf in an action or a proceeding;
> (e) an officer or employee of an incorporated or unincorporated organization preparing a document for the use of the organization or to which it is a party.

32. Section 7.6 of the Code of Professional Conduct imposes a positive obligation on lawyers to assist in preventing the unauthorized practice of law;

> 7.6 A lawyer must assist in preventing the unauthorized practice of law.

33. While admittedly the Employer had not initially raised the issue, the true nature of Ms. Pryzner's role only became clear somewhat after the fact, and in any event, two wrongs did not make a right. Once present counsel became aware of what was occurring (noting that a different lawyer had been representing the Employer earlier in the process, albeit from the same office as present counsel) the objection was raised in a timely fashion. This was not a tactical move but rather a legitimate objection properly required to be advanced due to the Code of Conduct.

34. The reason non-lawyers cannot practice law is to protect the public. While non-lawyers may have technical or personal abilities, they are immune from the Law Society of Manitoba's control, regulation and possible discipline for misconduct. Clients of a non-lawyer do not enjoy the benefit of lawyer-client privilege, the duty of confidentiality, a professional standard of care and professional liability insurance.

35. The restriction of the practice of law to lawyers is not limited to the courtroom. The Supreme Court of Canada in Law Society (British Columbia) v Mangat 2001 SCC 67 held that the “representation before a tribunal has as its object the determination of legal rights. It falls within the scope of legal representation and the practice of law”.

36. In Mangat the Supreme Court of Canada outlined the importance of protecting the public from the unauthorized practice of law;

> Provincial law societies or bars are entrusted with the mandate of governing the legal profession with a view towards protecting the public when professional services are rendered. In exchange for a monopoly on the exercise of the profession and in accordance with the primary purpose of protecting the public in its dealings with lawyers, the bar must establish criteria for jurists to qualify as members, rules of discipline and mechanisms to enforce it, the contours of professional liability, a system of professional insurance, and guidelines and rules on the handling of trust funds. In this context, the bar is entrusted with policing the illegal practice of law both to enforce its monopoly and to protect the public from imposters. (at para 41)

37. If Parliament wanted to allow non-lawyers to represent individuals in unjust dismissal proceedings under the Code, it could and should specifically have said this in the Code. Examples of this Parliamentary intention can be found in other federal legislation such as:

(a) Allowing an "agent" to appear before the Civil Aviation Tribunal under the Aeronautics Act;
(b) Allowing a "representative" of an RCMP member (who also must be a member) to appear before the Public Complaints Commission under the Royal Canadian Mounted Police Act;
(c) Allowing a "representative" to appear in any proceedings under the Pension Act;

(d) Allowing a "representative" to appear before the Pilotage Authority under the Pilotage Act;
(e) Allowing a "person of the offender's choice" to appear in hearings before the National Parole Board under the Corrections and Conditional Release Act;
(f) Allowing an "agent" to appear in hearings before the Canadian International Trade Tribunal under the Canadian International Trade Tribunal Act;
(g) Allowing "patent agents" to appear before the Patent Office under the Patent Act; and
(h) Allowing "trade-mark agents" to appear before the Trade-marks Office under the Trade-marks Act.

38. Only when there is a clear benefit to allowing non-lawyers to assist individuals in specific proceedings does Parliament allow for that. When Parliament does choose to allow it, the legislation is always explicit.

39. In Mangat there were conflicting provisions between the Legal Profession Act of British Columbia and sections 30 and 69(1) of the federal Immigration Act. The Immigration Act provisions allowed participants to obtain the services of “other counsel”, explicitly distinguished from “barristers”, “solicitors” or an “agent”. The Court noted how participants in immigration proceedings could benefit from representation by non-lawyers as it could be difficult to find lawyers who were fluent in other languages or familiar with different cultures.

40. In The Law Society of Manitoba v Pollock 2007 MBQB 51 Mr. Pollock relied upon Mangat and argued the exception in section 20 of The Legal Profession Act ("Except as permitted by or under this Act or another Act…") should be read in light of the provisions of the Criminal Code, The Court of Queen's Bench Small Claims Practices Act, the Divorce Act, The Human Rights Code and the Immigration and Refugee Protection Act. He argued that each of those statutes authorized him to act and appear for parties in proceedings conducted pursuant to those pieces of legislation, and so he should be able to provide such services to paying clients, including in court.

41. Justice Monnin of the Manitoba Court of Queen’s Bench noted how Mangat dealt with the question of appearances before a specific federal tribunal as expressly allowed by Parliament, and did not grant some general right for non-lawyers to appear in court or elsewhere. He reviewed the various pieces of legislation in question and determined that Mr. Pollock was entitled pursuant to section 800(2) of the Criminal Code to act as an agent in summary conviction proceedings, because Parliament explicitly allowed that. There was no similar express language in the other legislation reviewed, however, therefore section 20 of The Legal Profession Act prohibited him from acting as a representative in those other proceedings. As a result, Justice Monnin issued a permanent injunction preventing Mr. Pollock from his unauthorized practice of law.

42. The Manitoba Court of Appeal (2008 MBCA 61) upheld Justice Monnin's decision. It also distinguished Mr. Pollock's case from Mangat because unlike in Mangat, the legislation in question did not specifically contain a provision authorizing non-lawyers to act for a party on a

commercial fee basis. The Manitoba Court of Appeal said “clear and express wording is required to circumvent the provisions of section 20 of The Legal Profession Act”.

43. There is nothing in the Code that enables a non-lawyer to represent a person in an unjust dismissal complaint.

44. The Human Resources and Skills Development Canada publication “Unjust Dismissal: A Guide to the Hearing Process” states that complainants "may be represented by an agent or a lawyer” but this is not founded in the legislation and so has no binding effect. The publication also states it "does not contain any legal advice". It is simply there as an informal and intended-to-be-helpful document that is not determinative or binding. Further, the only reference to an “agent” in the Code is with respect to a “bargaining agent” in the context of unionized employees, which is not applicable here.

45. Given the lack of clear and express wording, it is obvious Parliament did not intend to allow complainants in unjust dismissal complaints to be represented by non-lawyers. There is no statutory exception to The Legal Profession Act of Manitoba and common law, which bar the practice of law by non-lawyers.

46. The Powers of the Canada Industrial Relations Board (delegated to an external unjust dismissal adjudicator) are set out in the Code are as follows:

> 16. The Board has, in relation to any proceeding before it, power
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> (a) to summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath and to produce such documents and things as the Board deems requisite to the full investigation and consideration of any matter within its jurisdiction that is before the Board in the proceeding;
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> (a.1) to order pre-hearing procedures, including pre-hearing conferences that are held in private, and direct the times, dates and places of the hearings for those procedures;
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> (a.2) to order that a hearing or a pre-hearing conference be conducted using a means of telecommunication that permits the parties and the Board to communicate with each other simultaneously;
>
> (b) to administer oaths and solemn affirmations;
>
> (c) to receive and accept such evidence and information on oath, affidavit or otherwise as the Board in its discretion sees fit, whether admissible in a court of law or not;
>
> (d) to examine, in accordance with any regulations of the Board, such evidence as is submitted to it respecting the membership of any employees in a trade union seeking certification;
>
> (e) to examine documents forming or relating to the constitution or articles of association of
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> (i) a trade union or council of trade unions that is seeking

certification, or

(ii) any trade union forming part of a council of trade unions that is seeking certification;

(f) to make such examination of records and such inquiries as it deems necessary;

(f.1) to compel, at any stage of a proceeding, any person to provide information or produce the documents and things that may be relevant to a matter before it, after providing the parties the opportunity to make representations;

(g) to require an employer to post and keep posted in appropriate places, or to transmit by any electronic means that the Board deems appropriate, any notice that it considers necessary to bring to the attention of any employees any matter relating to the proceeding;

(h) subject to such limitations as the Governor in Council may, in the interests of defence or security, prescribe by regulation, to enter any premises of an employer where work is being or has been done by employees and to inspect and view any work, material, machinery, appliances or articles therein and interrogate any person respecting any matter that is before the Board in the proceeding;

(i) to order, at any time before the proceeding has been finally disposed of by the Board, that

(i) a representation vote or an additional representation vote be taken among employees affected by the proceeding in any case where the Board considers that the taking of such a vote would assist the Board to decide any question that has arisen or is likely to arise in the proceeding, whether or not such a representation vote is provided for elsewhere in this Part, and

(ii) the ballots cast in any representation vote ordered by the Board pursuant to subparagraph (i) or any other provision of this Part be sealed in ballot boxes and not counted except as directed by the Board;

(j) to enter on the premises of an employer for the purpose of conducting representation votes during working hours;

(k) to authorize any person to do anything that the Board may do under paragraphs (a) to (h), (j), or (m) and to report to the Board thereon;

(l) to adjourn or postpone the proceeding from time to time;

(l.1) to defer deciding any matter, where the Board considers that the matter could be resolved by arbitration or an alternate method of resolution;

(m) to abridge or extend the time for doing any act, filing any document or presenting any evidence in connection with a proceeding;

> (m.1) to extend the time limits set out in this Act for instituting a proceeding;
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> (n) to amend or permit the amendment of any document filed in connection with the proceeding;
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> (o) to add a party to the proceeding at any stage of the proceeding;
>
> (o.1) to summarily refuse to hear, or dismiss, a matter for want of jurisdiction or lack of evidence;
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> (p) to decide for all purposes of this Part any question that may arise in the proceeding, including, without restricting the generality of the foregoing, any question as to whether
>
> i) a person is an employer or an employee,
>
> ii) a person performs management functions or is employed in a confidential capacity in matters relating to industrial relations,
>
> iii) a person is a member of a trade union,
>
> iv) an organization or association is an employers' organization, a trade union or a council of trade unions,
>
> v) a group of employees is a unit appropriate for collective bargaining,
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> vi) a collective agreement has been entered into,
>
> vii) any person or organization is a party to or bound by a collective agreement, and
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> viii) a collective agreement is in operation; and
>
> (q) to decide any question that may arise in a proceeding under Part II or III.
>
> Determination without oral hearing
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> 16.1 The Board may decide any matter before it without holding an oral hearing.

47. Tribunals (including unjust dismissal adjudicators) are creatures of legislation and their powers must be explicitly found in such legislation. While by section 16(q) of the Code an adjudicator has the power to decide any question raised in the proceeding nothing in the Code specifically grants an adjudicator the power to permit a non-lawyer to represent a complainant.

48. In Aasland v. Manitoba (Attorney General) 2002 CarswellMan 612, Justice Clearwater found that judges do not have the inherent jurisdiction to allow a non-lawyer to act as a lawyer in a Manitoba Court;

> I have concluded, in light of the provisions of The Law Society Act, combined with an analysis of the common-law to the extent that it has

> been developed in this area (I refer specifically to the three Manitoba cases, supra), that this court or myself as a judge of this court, does not have the inherent jurisdiction to permit litigants to be represented by non-lawyers or non-barristers or non- solicitors in proceedings before this court, other than as may be specifically authorized in some particular piece of legislation. (emphasis added) (para 18)

49. Similarly, in Nelson v Minister of National Revenue, [1996] F.C.J., No. 1642 the Federal Court determined that the Federal Court Rules did not provide the Court with discretion to permit an individual to be appear other than on a self-represented basis, or as represented by a lawyer. Accordingly, a husband was not permitted to represent his wife in relation to a discharge of tax certificates.

50. This applies equally to unjust dismissal adjudications under the Code and an adjudicator does not have the jurisdiction to allow a non-lawyer to play the role of lawyer.

51. In Moss v. NN Life Insurance of Canada/Transamerica 2004 MBCA 10 the Manitoba Court of Appeal framed the issue as:

> What is to be done when that self-represented person shows up in court with a friend or relative who indicates that he or she is there to assist or to speak for the self-represented litigant in the presentation of the case?
>
> It depends. It depends on the extent of the intended assistance. It depends on whether, in reality, the friend or relative is there to play the role of a substitute lawyer. It depends on the circumstances, including the ability and integrity of the friend or relative (to the extent they are ascertainable). (paras 6 and 7)

52. In Moss at first instance Justice Scurfield described the issue as a request to have Mrs. Moss's husband represent her as agent "in the same manner as a lawyer would act." He held that to grant such permission would violate the provisions of The Legal Profession Act. The Manitoba Court of Appeal upheld his decision.

53. Section 20(3) of The Legal Profession Act deems certain conduct to constitute carrying on the practice of law;

> 20(3) A person who does any of the following, directly or indirectly, for or in the expectation of a fee or reward is deemed to be carrying on the practice of law:
>
> (a) draws, revises or settles any of the following documents:
>
> (i) a document relating to real or personal property,
>
> (ii) a document for use in a proceeding, whether judicial or extra-judicial,
>
> (iii) a document relating to the incorporation, administration, organization, reorganization, dissolution or winding-up of a corporation,

> (iv) a will, deed, settlement, trust deed or power of attorney, or any document relating to the guardianship or estate of a person,
>
> (v) a document relating to proceedings under any statute of Canada or of Manitoba;
>
> (b) negotiates or solicits the right to negotiate for the settlement of, or settles, a claim for loss or damage founded in tort;
>
> (c) agrees to provide the services of a practising lawyer to any person, unless the agreement is part of, or is made under
>
> (i) a prepaid legal services plan,
>
> (ii) a liability insurance policy, or
>
> (iii) a collective agreement or collective bargaining relationship;
>
> (d) gives legal advice.

54. Notably, this includes when certain things are done for or in expectation of a fee or reward, drawing or revising documents for use in a proceeding under any statute of Canada or Manitoba, and giving legal advice.

55. In The Law Society of Manitoba v Kalo 2019 MBQB 60 the Manitoba Court of Queen's Bench clarified and confirmed that even if a fee or reward is not received or expected, that does not mean an unauthorized person was not engaging in the practice of law.

56. Justice Martin noted how The Legal Profession Act does not define what it is to "carry on the practice of law", and nor does it refer to a fee under section 20(2). The ways of carrying on the practice of law are very broad and situation dependent. While section 20(3) lists some tasks that lawyers perform, it is not meant to be an exhaustive catalogue of what is meant by carrying on the practice of law;

> …it is clear that the limited interpretation of when a person assisting a self-represented individual will not violate s. 20 of the Act is as set out earlier: such a person will not be engaged in the unauthorized practice of law, will not violate s. 20, if they are lending a helping hand to a self-represented individual, without fee and on an isolated occasion. The nature and extent of the assistance will be determinative — in other words, modest assistance, rarely given, with no expectation of compensation. Wannabe lawyers, "helping" others, do not fall within this very narrow exception. (para 33)

57. The Manitoba Court of Appeal upheld Justice Martin's decision (2019 MBCA 112) which (as reported by the Manitoba Court of appeal) had enjoined and restrained Mr. Kalo from:

> …practising, attempting to practise law, or offering or providing legal services, whether or not for reward or consideration of any kind, including, but not limited to… appearing before any board, tribunal or adjudicative body of any kind on behalf of any person other than himself, including any corporation, or otherwise advocating in or advising upon any such proceedings…" (para 7)

58. It is significant that Ms. Pryzner has appeared and ostensibly functioned as a lawyer in this and another unjust dismissal complaint under the Code. She also prepared and submitted legal briefs in the Federal Court in this matter (a clear breach of The Legal Profession Act). The Employer had intended on raising this as an issue in Federal Court, however the Federal Court found the judicial review application was premature and should not be brought until after the merits of the matter (as opposed to simply the jurisdictional issue) were adjudicated.

59. Ms. Pryzner's intention to represent Mrs. Tacan as a substitute lawyer has been clear in her representations even to me as adjudicator via email correspondence, and her conduct at the jurisdictional hearings where she gave the opening statement, cross-examined every witness, and provided a closing statement. It is also plain she prepared all materials that have been filed in this matter. Her arguments have included references to case law, legislation and other authorities. Ms. Pryzner clearly is providing legal advice, and is in breach of The Legal Profession Act. This is not in Mrs. Tacan's interest, who would be best served receiving legal advice from a trained lawyer.

60. It is implicit by the sheer amount of work and time invested in this file that Ms. Pryzner certainly must be expecting some fee or reward of some sort for this. There was no sworn evidence provided that she was doing this for free, and so an adverse inference should be drawn.

61. Ms. Pryzner was not merely acting as a "McKenzie friend" by providing help or support. If so the Employer would not have objected. She was doing far more than assisting and there had to be clear boundaries set for her participation in the process moving forward.

Argument of the Complainant

62. Ms. Pryzner argued she was simply providing assistance to Mrs. Tacan and was not practicing law or acting as a lawyer. She was a helper, advocate or representative (as I myself had described her on the title pages of the earlier jurisdictional awards) and that was permitted by the Code.

63. Lawyers did not have a monopoly in terms of reading and interpreting statutes or case law. Academics did this all the time and frequently wrote about statutes and cases.

64. All that was occurring here was Ms. Pryzner applying her academic skills in helping Mrs. Tacan, who needed help. They were working together as a team, employing their different skill sets. Mrs. Tacan had the right to be helped and the right to choose who would help her.

65. All documents in all proceedings were co-written and discussed by her and Mrs. Tacan, and ultimately authorized by Mrs. Tacan. All decisions were made by Mrs. Tacan.

66. Mrs. Tacan had represented herself in Federal Court, where the process was admittedly different than here, and a non-lawyer could not act as a representative.

67. Ms. Pryzner was not being paid at all and did not expect to be paid anything. She was doing this on a strictly volunteer basis and making a significant donation in terms of time, effort and energy. She was helping Mrs. Tacan because it was the "right thing" to do.

68. The Human Resources and Skills Development Canada publication “Unjust Dismissal: A Guide to the Hearing Process” was issued by those presumably the most knowledgeable about the Code and the process, and should be respected.

69. The publication expressly stated that complainants "may be represented by an agent or a lawyer”.

70. The publication described the process as providing an "affordable and effective way to resolve disputes about businesses from employment" and acknowledged that while adjudication is a legal process to determine the parties' rights, "the rules followed and procedures used are less formal than in a court of law, allowing for more flexibility in the process".

71. It went on to state "the adjudicator will make an objective decision about the alleged unjust dismissal based on the facts and evidence presented at the hearing". It also stated that "adjudicators might also rely on past unjust dismissal adjudication decisions when deciding your case. They're not obligated to follow those decisions, but they can serve as helpful guides".

72. Ms. Pryzner said I was not obliged to follow past precedents. Instead, I have discretion and could allow her to act as Mrs. Tacan's representative if I felt that appropriate.

73. Ms. Pryzner asserted it bordered on an abuse of process to raise this objection this late in the day. She said it was nothing more than an attempt to deflect attention away from the merits of the file and to frustrate the process and Mrs. Tacan's pursuit of her claim.

74. In this context, Ms. Pryzner referred me to Aba-Alkhail v. University of Ottawa 2013 ONCA 633 in which the Ontario Court of Appeal stated at paragraph 12:

> In any event, the abuse of process doctrine can apply not only to bar re-litigation of issues that were actually determined in the administrative process, but also to issues that could have been determined…This gives further incentive to raise all issues at the administrative proceeding and to participate "with full vigour."

75. She also referred me to Skypower CL 1 LP v Ontario Power Authority 2015 ONCA 427 in which the Ontario Court of Appeal stated at paragraph three:

> The motion judge was correct in deciding that the appellant's failure to raise the targeting allegation in the judicial review proceedings was sufficient for the abuse of process doctrine to apply.

76. Ms. Pryzner also referred to Winter v. Sherman Estate 2018 ONCA 703 in which the Ontario Court of Appeal stated in paragraph seven:

> Further, the appellants too narrowly construe the doctrine of abuse of process. This doctrine is flexible and unencumbered by the specific requirements of res judicata issue estoppel: Behn v. Moulton Contracting Ltd., 2013 SCC 26, [2013] 2 S.C.R. 227, at para 40; Toronto (City) v. C.U.P.E., Local 79, 2003 SCC 63, [2002] 3 S.C.R. 77 at para.42. Where a precondition for issue estoppel has not been met, such as mutuality of parties, courts have turned to the doctrine of abuse of process to preclude re-litigation of the same issue: C.U.P.E., at para. 37. While the doctrine is similar to issue estoppel in that it can

> bar litigation of legal and factual issues "that are necessarily bound up with the determination of" an issue in the prior proceeding, abuse of process also applies where issues "could have been determined": Danyluk v. Ainsworth Technologies Inc., 2001 SCC 44, [2001] 2 S.C.R. 460, at para. 54; Aba-Alkhail v. University of Ottawa, 2013 ONCA 633, 363 D.L.R. (4th) 470, at para 13; McQuillan v. Native Inter-Tribal Housing Co-operative Inc. (1998), 42 O.R. (3d) 46 (C.A.), at pp. 50–51. As such, the doctrine of abuse of process is broader than res judicata and issue estoppel and applies to bar litigation that, if it proceeded, would "violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice": C.U.P.E., at para. 37.

77. That this objection was an abuse of process was clear from the fact it was not raised by the Employer's legal team at the start (unlike the other objections to proceeding on the merits), and only long after the Employer's objections on jurisdiction had been dismissed (subject to now pending court processes) and only at the last possible moment on the threshold of proceeding on the merits. If this had been a legitimate objection it should have been raised at the very start of the process. The extreme delay confirmed this was not a good faith or legitimate objection, it should be recognized for what it was, and dismissed.

78. In Jaime v CanJet Airlines, a division of I.M.P. Group Limited 2017 CIRB 864 and 2018 CIRB 886, a party was represented by their daughter (a non-lawyer) in a Canada Industrial Relations Board proceeding and that daughter was accepted by all as a proper representative. There was no prohibition of such practice.

79. There are numerous explicit examples in the Canada Industrial Relations Board Regulations made under the Code that draw a clear distinction between "legal counsel" and a "representative". Specifically, Ms. Pryzner referred me to sections 7(1), 10(a), 12(1), 12.1(1), 33(a), 37(a), 41(a), 41.1(a), 42(1)(a), 43 and 45(1)(a).

80. Ms. Pryzner noted section 12.1 of these Regulations allows any "person" to apply for intervenor status, with representation contemplated by "legal counsel" or a "representative". A "representative" is not a defined term but as both words are used clearly it is something different than legal counsel (i.e. a lawyer).

81. Ms. Pryzner also drew my attention to section 46 of these Regulations which states:

> The Board may vary or exempt a person from complying with any rule of procedure under these Regulations - including any time limits imposed under them or any requirement relating to the expedited process - where the variation or exemption is necessary to ensure the proper administration of the Code.

82. Ms. Pryzner referred me to the Interpretation Act, and in particular the following sections;

> 2(1) public officer includes any person in the federal public administration who is authorized by or under an enactment to do or enforce the doing of an act or thing or to exercise a power, or on whom a duty is imposed by or under an enactment;
>
> 24(5) Where a power is conferred or a duty imposed on the holder of an office, the power may be exercised and the duty shall be performed by the person for the time being charged with the execution of the powers and duties of the office.

> 31(1) Where anything is required or authorized to be done by or before a judge, provincial court judge, justice of the peace or any functionary or officer, it shall be done by or before one whose jurisdiction or powers extend to the place where the thing is to be done.
>
> 31(2) Where power is given to a person, officer or functionary to do or enforce the doing of any act or thing, all such powers as are necessary to enable the person, officer or functionary to do or enforce the doing of the act or thing are deemed to be also given.

83. Ms. Pryzner said that as an adjudicator under the Code I was a "public officer" as per the Interpretation Act, required to exercise the powers given to me and also (by section 31(2)) when doing so, "all such powers as are necessary to enable [me] to do or enforce the doing of the act or thing are deemed to be also given".

84. She referred me to section 12 of the Interpretation Act, which stated:

> Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

85. Overall then, I had been given the power to decide that a non-lawyer could act as a representative in an unjust dismissal proceeding under the Code, and I should exercise my power and allow that to occur here.

86. Ms. Pryzner said this was consistent with case law and referred me to Lawrence v. International Brotherhood of Electrical Workers (IBEW) Local 773, 2017 ONCA 321 at paragraph 21 in which the Ontario Court of Appeal stated:

> …There may well be proceedings that are so irregular as to qualify as nullities but the Rules of Civil Procedure suggest that those proceedings should be confined to a very narrow range. The Rules aim, in the words of r.1.04(1), to "secure the just, most expeditious and least expensive determination of every civil proceeding on its merits." The courts are directed by r.2.01(1)(a) to grant all necessary amendments or other relief, on such terms as are just, to secure the just determination of the real matters in dispute." Treating procedural flaws or defects as fatal nullities incapable of amendment, is inconsistent with that approach.

87. Mrs. Tacan confirmed she agreed with what Ms. Pryzner was saying. She said she was not paying Ms. Pryzner in any manner, who was not giving her any legal advice and instead only was trying to help her.

88. Mrs. Tacan added that Ms. Pryzner had never claimed to be a lawyer, never represented herself as a lawyer, and never acted as her lawyer. She was an advocate, a representative and had grown to be a friend. Mrs. Tacan could not afford a lawyer and did not believe it was in her best interests to be required to hire one or represent herself.

89. Mrs. Tacan saw this objection as simply one more roadblock to delay and frustrate the process, and a means of trying to create another point to argue on a judicial review application. She objected to what she felt was a wrongful expenditure of a significant amount of money on legal processes, which the Employer could much better have spent on the community's needs.

Reply

90. In reply, the Employer noted the assertion that lawyers do not have a monopoly regarding the application of case law and statutes, was simply wrong. They did and this was the case because it was a regulated profession. There was good reason for the monopoly, being to ensure quality of service and protection of the public.

91. While it was true that under Part One of the Code and the Canada Industrial Relations Board Regulations non-lawyers could act in various proceedings, such as where unions represented employees, that had nothing to do with the Code's provisions regarding unjust dismissals where a person could only self-represent, or have a lawyer as a representative.

92. In the Jaime cases there was no determination of the issue on whether or not it was appropriate for the non-lawyer daughter to be acting as a representative. No one raised a challenge and so that was not something the Board actually decided.

93. While it was true the issue should been raised earlier in the process here, there had been no advance notice of what Ms. Pryzner's role would be, and the role had grown or expanded while the process was underway. It did not matter the earlier lawyer had not averted to the issue for whatever reason. When present legal counsel became involved and realized there was an issue, he had raised it in timely fashion.

Analysis

94. We must start from the perspective the law applies to everyone, and while I have the role as an adjudicator of unjust dismissals to interpret it, I have no right to amend the law.

95. In Manitoba, the law is in the form of The Legal Profession Act, which does in fact confirm a monopoly on the practice of law;

> 20(2) Except as permitted by or under this Act or another Act, no person shall:
>
> (a) carry on the practice of law;
>
> (b) appear as a lawyer before any court or before a justice of the peace;
>
> (c) sue out any writ or process or solicit, commence, carry on or defend any action or proceeding before a court; or
>
> (d) attempt to do any of the things mentioned in clauses (a) to (c).

96. The work done by academics in terms of reading and interpreting statutes and case law may be similar but is not the practice of law.

97. Respectfully, it matters not whether Mrs. Tacan consents or very much desires it. It matters not that a Human Resources and Skills Development Canada publication (not "another Act" as contemplated above) says representation by a non-lawyer is permitted. It matters not whether Mrs. Tacan can afford a lawyer or, might well before be forced into self-representation possibly to her detriment. If "representation" in an unjust dismissal complaint under the Code means the representative is practising law, that is not permissible and I cannot allow it to occur unless there is some exemption permitted by the statute.

98. I agree the exceptions set forth in section 20(4) of The Legal Profession Act do not apply.

99. I accept the reason non-lawyers cannot practice law is to protect the public. Obviously every case is different and in some circumstances the public would be more at risk if certain non-lawyers were performing some of the roles a lawyer normally would be called on to play than in other circumstances. Regardless, my role is not to assess the level of risk and determine if it is acceptable or not. The Supreme Court of Canada addressed this in Mangat and I cannot improve on what was said there;

> Provincial law societies or bars are entrusted with the mandate of governing the legal profession with a view towards protecting the public when professional services are rendered. In exchange for a monopoly on the exercise of the profession and in accordance with the primary purpose of protecting the public in its dealings with lawyers, the bar must establish criteria for jurists to qualify as members, rules of discipline and mechanisms to enforce it, the contours of professional liability, a system of professional insurance, and guidelines and rules on the handling of trust funds. In this context, the bar is entrusted with policing the illegal practice of law both to enforce its monopoly and to protect the public from imposters. (emphasis added) (at para 41)

100. There are various circumstances in which Parliament or a provincial legislature has determined it appropriate on an exceptional basis to allow someone who is not a lawyer to fulfil a function that normally would be considered to be practising of law. Broadly speaking, the entity charged with making that decision, be that either Parliament or a provincial legislature, has determined that in the specific context, it makes good sense to do so.

101. In Manitoba this possibility is contemplated in the opening words of section 20 of The Legal Profession Act "Except as permitted by or under this Act or another Act".

102. Section 16(q) of the Code does grant me the power to decide any question raised in a proceeding. As an adjudicator I may not be obliged to follow past precedents in the sense of assessing whether a dismissal has been just or unjust, what remedy is appropriate in the case of an unjust dismissal, and other related matters. Every case is different and must be determined on its own merits. That said, nothing in the Code or as part of my determination of a case on the merits specifically grants me as adjudicator the power to override the legislature and grant someone the right to practice law when a statute specifically limits that right to certain persons.

103. Case law, specifically Mangat, Pollock and Moss, makes it clear that any exception must be expressly stated. Notwithstanding the creative interpretations and application of the Interpretation Act and the Code urged upon me, I have no power to find through any reasonable implication, assumption or conclusion that The Legal Profession Act or any other Act allows someone who is not a lawyer to practice law in the context of representing someone in an unjust dismissal claim under the Code.

104. This is supported by Aasland and Nelson. If Justices of the Manitoba Court of Queen's Bench and the Federal Court do not have such inherent power (despite the fact they do possess certain inherent powers), surely I as a creature of statute do not.

105. While by section 20(3) of The Legal Profession Act someone is deemed to be carrying on law when performing certain functions with the expectation of a fee or reward, as noted in Kalo, this does not mean performing the very same functions for free means the person is not practising law.

106. In the Jaime cases it is true that someone not a lawyer was allowed to act as a representative. The same could be said here, in that in the earlier jurisdictional hearings Ms. Pryzner was allowed to act as a representative. Like in Jaime, that occurred because no one objected to it, and so there was no determination of the issue. That something was allowed to occur which perhaps with hindsight ought properly not to have occurred, does not make it acceptable moving forward.

107. With respect, the reference to the various provisions in the Canada Industrial Relations Board Regulations are of no assistance to Ms. Pryzner and Mrs. Tacan. They do not apply in the context of unjust dismissals. Further, the prospect of someone who is not a lawyer acting as a representative in such other types of processes (as contemplated with express language, in contrast to the absence of such language in the context of unjust dismissals) suggests that indeed those exceptions have no application here.

108. Likewise, the reference to the Rules of Civil Procedure in International Brotherhood of Electrical Workers (IBEW) Local 773 case is of no assistance as that case specifically addressed the application of those court rules in a court proceeding and so is quite different than the circumstances facing us.

109. The abuse of process argument was interesting and I can well understand why it was raised, taking into account the timing of the objection. Still, it is the case that section 7.6 of the Code of Professional Conduct imposes a positive obligation on lawyers to assist in preventing the unauthorized practice of law. Further, the prohibition on a non-lawyer practising law is the prohibition and regardless of why this may not have been addressed earlier cannot somehow practically amend the statute now and allow it to take place moving forward.

110. Also interesting is the position taken in the Human Resources and Skills Development Canada publication where it expressly states that unjust dismissal complainants "may be represented by an agent or a lawyer”. The version I saw is from 2010 but I am unaware as to when it originally issued, how many people have been guided by it or in how many other cases non-lawyers have represented parties in these types of proceedings. I have personal knowledge of at least one other case and assume this has occurred in other circumstances as well. To my knowledge, there has never been an objection before now and presumably the system has functioned reasonably well with (I assume) non-lawyers on occasion representing parties. Perhaps moving forward Parliament or a legislature might consider amendments so as to allow that practice.

111. I emphasize I draw no adverse inference at all from the fact there is no affidavit evidence before me. I have no reason to believe Ms. Pryzner is being paid for her efforts or has any expectation of reward in the future, on this file or on any other file. She said specifically she was doing what she was because it was the "right thing" to do and I have no reason to doubt that. Still though, it makes no difference. If what she is doing is practising law then it is prohibited unless there is some exception. As is clear from these reasons for decision, I have found no such exception.

112. I have no evidence before me as to the role Ms. Pryzner played in any other unjust dismissal complaint, or at Federal Court. I am however well aware of the role she played in the proceedings before me. Taking at face value her own assertion and that of Mrs. Tacan they collaborated on any written materials and Mrs. Tacan ultimately made any final decisions does not change the fact Ms. Pryzner did provide an opening statement for Mrs. Tacan, put questions to Mrs. Tacan in direct examination, cross-examined witnesses and provided a closing statement. Her role was not limited to that of a "McKenzie friend" in merely providing help or support. She will not be allowed to perform any such extra functions as we proceed to a hearing on the merits of this file.

113. I sincerely thank the parties for the thoughtful and creative manner in which they presented their positions.

Issued this 22nd day of February, 2021.

Jeffrey J. Palamar, Adjudicator